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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARTHA C.,¹

Plaintiff,

v.

ANDREW M. SAUL,²
Commissioner of Social Security,
Defendant.

Case No. 2:18-cv-05576-MAA

**MEMORANDUM DECISION AND
ORDER REVERSING DECISION OF
THE COMMISSIONER AND
REMANDING FOR FURTHER
ADMINISTRATIVE PROCEEDINGS**

On June 22, 2018, Plaintiff filed a Complaint seeking review of the Commissioner's final decision denying her application for a period of disability and Disability Insurance Benefits pursuant to Title II of the Social Security Act. This matter is fully briefed and ready for decision. For the reasons discussed below, the Commissioner's final decision is reversed, and this matter is remanded for further administrative proceedings.

¹ Plaintiff's name is partially redacted in accordance with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

² The Commissioner of Social Security is substituted as the Defendant pursuant to Federal Rule of Civil Procedure 25(d).

1 **ADMINISTRATIVE BACKGROUND**

2 On January 21, 2015, Plaintiff filed an application for a period of disability
3 and Disability Insurance Benefits, alleging disability beginning on June 13, 2014.
4 (Administrative Record [AR] 13, 53.) Plaintiff alleged disability because of back
5 pain from herniated discs, high blood pressure, depression, an irregular heartbeat,
6 high cholesterol, incontinence, and hand tremors. (AR 53.) After her application
7 was denied initially, Plaintiff requested a hearing before an Administrative Law
8 Judge (“ALJ”). (AR 13, 73-74.) At a hearing held on January 31, 2017, at which
9 Plaintiff appeared with counsel, the ALJ heard testimony from Plaintiff and a
10 vocational expert. (AR 25-52.)

11 In a decision issued on June 22, 2017, the ALJ denied Plaintiff’s claim after
12 making the following findings pursuant to the Commissioner’s five-step evaluation.
13 (AR 13-20.) Plaintiff had not engaged in substantial gainful activity since her
14 alleged onset date of June 13, 2014. (AR 15.) She had a severe impairment
15 consisting of degenerative disc disease of the lumbar spine. (*Id.*) She did not have
16 an impairment or combination of impairments that met or medically equaled the
17 requirements of one of the impairments from the Commissioner’s Listing of
18 Impairments. (AR 17.) She had a residual functional capacity to perform light
19 work but with additional postural and environmental limitations. (*Id.*) Based on
20 this residual functional capacity, Plaintiff could perform her past relevant work as a
21 teacher aide II, both as actually performed and as generally performed in the
22 national economy. (AR 20.) Accordingly, the ALJ concluded that Plaintiff was not
23 disabled as defined by the Social Security Act. (*Id.*)

24 On May 25, 2018, the Appeals Council denied Plaintiff’s request for review.
25 (AR 1-6.) Thus, the ALJ’s decision became the final decision of the
26 Commissioner.

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1 assessment of Plaintiff's subjective complaints. Having found that remand is
2 warranted, the Court declines to address Plaintiff's remaining arguments. *See Hiler*
3 *v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) ("Because we remand the case to the
4 ALJ for the reasons stated, we decline to reach [plaintiff's] alternative ground for
5 remand."); *see also Augustine ex rel. Ramirez v. Astrue*, 536 F. Supp. 2d 1147,
6 1153 n.7 (C.D. Cal. 2008) ("[The] Court need not address the other claims plaintiff
7 raises, none of which would provide plaintiff with any further relief than granted,
8 and all of which can be addressed on remand.").

9
10 **A. Plaintiff's Subjective Symptom Allegations (Issue Three).**

11 **1. Legal Standard.**

12 An ALJ must make two findings in assessing a claimant's pain or symptom
13 allegations. Social Security Ruling ("SSR") 16-3P, 2017 WL 5180304, at *3;
14 *Treichler*, 775 F.3d at 1102. "First, the ALJ must determine whether the claimant
15 has presented objective medical evidence of an underlying impairment which could
16 reasonably be expected to produce the pain or other symptoms alleged." *Treichler*,
17 775 F.3d at 1102 (citation omitted). "Second, if the claimant has produced that
18 evidence, and the ALJ has not determined that the claimant is malingering, the ALJ
19 must provide specific, clear and convincing reasons for rejecting the claimant's
20 testimony regarding the severity of the claimant's symptoms" and those reasons
21 must be supported by substantial evidence in the record. *Id.*; *see also Marsh v.*
22 *Colvin*, 792 F.3d 1170, 1174 n.2 (9th Cir. 2015).

23 "A finding that a claimant's testimony is not credible 'must be sufficiently
24 specific to allow a reviewing court to conclude the adjudicator rejected the
25 claimant's testimony on permissible grounds and did not arbitrarily discredit a
26 claimant's testimony regarding pain.'" *Brown-Hunter v. Colvin*, 806 F.3d 487, 493
27 (9th Cir. 2015) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991)
28 (*en banc*)).

1 Effective March 28, 2016, SSR 16-3P rescinded and superseded the
2 Commissioner's prior rulings as to how the Commissioner will evaluate a
3 claimant's statements regarding the intensity, persistence, and limiting effects of
4 symptoms in disability claims. *See* SSR 16-3P, 2017 WL 5180304, at *1. Because
5 the ALJ's decision in this case was issued on June 22, 2017, it is governed by SSR
6 16-3P. *See id.* at *13 and n.27. In pertinent part, SSR 16-3P eliminated the use of
7 the term "credibility" and clarified that the Commissioner's subjective symptom
8 evaluation "is not an examination of an individual's character." SSR 16-3P, 2017
9 WL 5180304, at *2; *see also Trevizo v. Berryhill*, 871 F.3d 664, 678 n.5 (9th Cir.
10 2017). These changes are largely stylistic and are consistent in substance with
11 Ninth Circuit precedent that existed before the effective date of SSR16-3P. *See*
12 *Trevizo*, 871 F.3d at 678 n.5.

13

14 **2. Background.**

15 During the hearing, Plaintiff testified as follows about her work history,
16 medical conditions, treatment, and activities:

17 Plaintiff's past work included jobs as an in-home caretaker and a teacher's
18 aide. (AR 30, 33.) She had worked as a teacher's aide for 35 years, but she
19 stopped doing that job to work exclusively as a caretaker for her mother. (AR 33.)
20 In 2014, she injured her back while trying to lift her mother. (AR 30; *see also* AR
21 400.) Plaintiff has not worked since the injury. (AR 31; *see also* AR 400.)

22 Two months before the hearing, Plaintiff purchased a cane at a CVS
23 drugstore because she needed it. (AR 33.) She used the cane at the hearing. (*Id.*)
24 She had received three epidural steroid injections for her back pain, but she
25 declined further injections because she felt they provided only temporary pain
26 relief. (AR 33-34.) Her most severe pain arises from her lower back. (AR 35.)
27 But she also has a kidney disease that requires several bathroom trips and hand
28 tremors that make it difficult to write. (AR 36, 37-38.)

1 On a typical day, Plaintiff cooks, does laundry, watches television, and lies
2 down in bed. (AR 36-37.) She shops for groceries with the help of her daughter
3 and does not drive. (AR 37.)

4 In addition to testifying at the hearing, Plaintiff submitted a written function
5 report that was similar in content to her hearing testimony. (AR 158-66.) Plaintiff
6 wrote that she cannot walk or stand for more than five minutes and that she shakes
7 too much. (AR 158.) She also wrote that on a typical day, she eats breakfast, gets
8 dressed, watches television, reads, goes out alone or with her daughter, prepares
9 meals, and does some chores. (AR 159.)

10 The ALJ rejected Plaintiff's subjective symptom allegations pursuant to the
11 Commissioner's two-step evaluation. (AR 18.) First, the ALJ found that Plaintiff's
12 "medically determinable impairments could reasonably be expected to cause the
13 alleged symptoms." (*Id.*) Second, the ALJ found that Plaintiff's subjective
14 statements were "not entirely consistent with the medical evidence and other
15 evidence in the record." (*Id.*) As support, the ALJ made detailed findings that
16 accounted for four types of reasons to reject Plaintiff's subjective symptom
17 allegations: (1) Plaintiff's refusal of additional epidural steroid injections; (2) her
18 treatment plan; (3) her use of a cane that was not prescribed; and (4) the objective
19 medical findings. (AR 18-19.) The Court reviews below each reason in turn.

21 3. Analysis.

22 As an initial matter, the Commissioner identifies two additional possible
23 reasons that the ALJ relied upon to discount Plaintiff's subjective symptom
24 allegations. (Joint Stip. at 28, 29.) According to the Commissioner, the ALJ also
25 relied on evidence of Plaintiff's daily activities and the opinions of three physicians
26 who had assessed Plaintiff's functional limitations. (*Id.*) The Court disagrees.
27 Although the ALJ did make certain findings about Plaintiff's daily activities and the
28 physicians' opinions, the ALJ never specifically tied those findings to Plaintiff's

1 subjective symptom allegations. *See Burrell v. Colvin*, 775 F.3d 1133, 1139 (9th
2 Cir. 2014) (declining to infer that an ALJ rejected a claimant’s testimony because
3 of findings about her treatment for headaches because, although the ALJ did make
4 such findings, “he never stated that he rested his adverse credibility determination
5 on those findings”). Thus, those findings are not reviewable here. *See Connett v.*
6 *Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003) (“[W]e are constrained to review the
7 reasons the ALJ asserts.”). Rather, the Court reviews only the other reasons
8 identified above, which were specifically tied to Plaintiff’s subjective symptom
9 allegations, to determine whether the ALJ stated clear and convincing reasons
10 supported by substantial evidence. (AR 18-19.)

11
12 **a. Plaintiff’s refusal of additional epidural steroid injections.**

13 The ALJ found that Plaintiff’s refusal of additional epidural steroid injections
14 was inconsistent with her pain allegations: although some evidence showed
15 Plaintiff received “good pain relief” (AR 560) from the injections, her “choice not
16 to continue with epidural injections is not consistent with the significant limitations
17 alleged by [Plaintiff].” (AR 18.)

18 A claimant’s “unexplained, or inadequately explained, failure to seek
19 treatment or follow a prescribed course of treatment” is a factor that “can cast doubt
20 on the sincerity of the claimant’s pain testimony.” *See Fair v. Bowen*, 885 F.2d
21 597, 603 (9th Cir. 1989); *see also* SSR 16-3P, 2017 WL 5180304, at *9 (“[I]f the
22 individual fails to follow prescribed treatment that might improve symptoms, we
23 may find the alleged intensity and persistence of an individual’s symptoms are
24 inconsistent with the overall evidence of record.”). On the other hand, “[w]here a
25 claimant provides evidence of a good reason for not taking medication for her
26 symptoms, her symptom testimony cannot be rejected for not doing so.” *Smolen v.*
27 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). For example, a claimant should not be
28 disqualified for refusing treatment if the record shows a physician had stopped it or

1 it was ineffective. *See Gallant v. Heckler*, 753 F.2d 1450, 1455 (9th Cir. 1984)
2 (finding an ALJ unjustified in discrediting a claimant’s pain complaints for failure
3 to take pain medication where the ALJ failed to note that a doctor recommended
4 that medication be stopped).

5 Here, after Plaintiff received three epidural steroid injections, the physician
6 who had administered them, Dr. Valdez, recommended a fourth injection (AR 583),
7 which Plaintiff declined (AR 34, 262). But Plaintiff’s refusal to follow Dr.
8 Valdez’s recommendation was not unexplained or inadequately explained, given
9 her repeated explanations that the initial injections provided only a short period of
10 relief. (AR 34, *see also* AR 257, 258, 280, 283, 289, 299, 382, 400, 431, 432.) The
11 evidence of “good pain relief” cited by the ALJ (AR 560) did not contradict
12 Plaintiff’s explanations because that evidence was written on the same day as an
13 injection, not after some time had passed. More significantly, the ALJ failed to
14 note that another physician, Dr. Ahn, agreed with Plaintiff that the three injections
15 already administered had “failed” and recommended back surgery instead. (AR
16 553-55.) Another physician, Dr. Sobol, similarly stated that Plaintiff “may” need
17 back surgery. (AR 266.)

18 Because the ALJ failed to address Plaintiff’s proffered explanation for why
19 she stopped receiving epidural steroid injections, which was supported by Dr.
20 Ahn’s assessment that the injections had failed, evidence of Plaintiff’s refusal to
21 undergo further injections was not a convincing ground to discredit her testimony,
22 despite Dr. Valdez’s recommendation of another injection. *See Trevizo*, 871 F.3d at
23 679-80 (finding an ALJ unjustified in discrediting a claimant’s subjective symptom
24 testimony for failure to take prescribed narcotics and rash medication because the
25 ALJ ignored the claimant’s proffered explanations of fears of addiction and of the
26 possibility the medication was causing the rash); *Nichols v. Califano*, 556 F.2d 931,
27 934 (9th Cir. 1977) (finding a claimant’s refusal to submit to a third surgery
28 justified where the previous two surgeries were unsuccessful, despite disagreements

1 among physicians about the probable success of a third surgery); *Lapeirre-Gutt v.*
2 *Astrue*, 382 F. App'x 662, 664 (9th Cir. 2010) (finding an ALJ unjustified in
3 discrediting a claimant's testimony for discontinuing physical therapy where the
4 claimant had explained that physical therapy was not effective). Thus, this was not
5 a clear and convincing reason based on substantial evidence.

6
7 **b. Plaintiff's treatment plan.**

8 The ALJ similarly found that Plaintiff had a treatment plan that "put her at a
9 range of light work." (AR 19.) Specifically, the ALJ noted that Plaintiff's
10 treatment plan "included an epidural injection, weight loss, Lidoderm patches,
11 Tylenol 3, and home exercises [AR 583]." (AR 19.)

12 In assessing a claimant's subjective symptom allegations, an ALJ properly
13 may consider a physician's "failure to prescribe, and [a claimant's] failure to
14 request, any serious medical treatment for this supposedly excruciating pain." *See*
15 *Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999); *see also Parra v. Astrue*, 481
16 F.3d 742, 751 (9th Cir. 2007) ("We have previously indicated that evidence of
17 'conservative treatment' is sufficient to discount a claimant's testimony regarding
18 the severity of an impairment.") (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th
19 Cir. 1995)); *Hanes v. Colvin*, 651 F. App'x 703, 705 (9th Cir. 2016) (finding an
20 adverse credibility determination supported by substantial evidence of a
21 "conservative treatment plan, which consisted primarily of minimal medication,
22 limited injections, physical therapy, and gentle exercise.").

23 Here, it appears that the ALJ reasoned that because Plaintiff's treatment plan
24 put her at a range of light work, the plan was inconsistent with the intensity of her
25 allegations. (AR 19.) But this reason did not account for changes in Plaintiff's
26 treatment plan over time. Plaintiff earlier tried other treatments that were
27 unsuccessful, such as physical therapy (AR 221), acupuncture (AR 428), and
28 trigger point injections (AR 597). More significantly, the ALJ failed to note, as

1 discussed above, Dr. Ahn’s assessment that the current treatment plan had failed
2 and that Plaintiff was a candidate for back surgery. (AR 553-55.) It is not clear
3 that Dr. Ahn’s recommendation of back surgery translates into an ability to perform
4 light work, such that it undermines Plaintiff’s pain complaints. *Cf. Burch v.*
5 *Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005) (ALJ properly discredited a claimant’s
6 allegation of back pain where, in part, no back surgery had been suggested). Thus,
7 this was not a clear and convincing reason based on substantial evidence.

8
9 **c. Plaintiff’s use of a cane that was not prescribed.**

10 The ALJ also found that Plaintiff’s use of a cane, which she had purchased at
11 the store, undermined her allegations because “[t]here is no prescription or
12 recommendation from a doctor in the medical evidence of record.” (AR 19.)

13 An ALJ may consider evidence that a claimant is using a cane that is not
14 medically prescribed to find the claimant’s allegations not credible. *See Verduzco*
15 *v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999) (holding that an ALJ permissibly
16 discounted the testimony of a claimant who “had walked slowly and used a cane at
17 the hearing, although none of his doctors had ever indicated that he used or needed
18 to use an assistive device in order to walk” and where “two doctors had specifically
19 noted that [the claimant] did not need such a device”). Here, however, such a
20 finding is unwarranted because the record does not support a reasonable inference
21 that Plaintiff, like the claimant in *Verduzco*, was trying to mislead the ALJ by using
22 a cane. Plaintiff testified that she purchased the cane from a drug store because she
23 needed it (AR 33), and she never tried to mislead the ALJ into thinking that a
24 physician had prescribed it. The ALJ’s finding that the cane was not medically
25 prescribed thus was not responsive to any subjective allegation that Plaintiff had
26 made. *See Saunders v. Astrue*, 433 F. App’x 531, 534 (9th Cir. 2011) (holding that
27 an ALJ improperly discredited a claimant’s testimony for using a cane that was not
28 prescribed where the claimant truthfully admitted that the cane helped him cope

1 with the pain and feel more comfortable). Thus, this was not a clear and convincing
2 reason based on substantial evidence.

3
4 **d. The objective medical findings.**

5 The ALJ also found that Plaintiff's subjective symptom allegations were not
6 consistent with objective medical findings. (AR 18, 19.) As support, the ALJ cited
7 several examples such as MRI results, clinical findings of a normal gait, physical
8 examination results, and x-ray results. (*Id.*)

9 "While subjective pain testimony cannot be rejected on the sole ground that it
10 is not fully corroborated by objective medical evidence, the medical evidence is still
11 a relevant factor in determining the severity of the claimant's pain and its disabling
12 effects." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (citing 20 C.F.R.
13 § 404.1529(c)(2)); *see also Burch*, 400 F.3d at 681. Here, however, this reason
14 forms the sole possible basis for the ALJ's discounting of Plaintiff's testimony
15 because, as discussed above, the other three reasons were legally insufficient. By
16 itself, this reason based on objective medical findings cannot constitute substantial
17 evidence to support the ALJ's rejection of Plaintiff's subjective symptom
18 allegations. *See Robbins v. Social Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006)
19 (holding that where an ALJ's other reason to reject the claimant's testimony was
20 legally insufficient, the sole remaining reason premised on the absence of objective
21 medical support could not justify the credibility determination); *see also Bunnell*,
22 947 F.2d at 345 ("[A]n adjudicator may not reject a claimant's subjective
23 complaints based solely on a lack of objective medical evidence to fully corroborate
24 the alleged severity of pain"). Thus, this reason was insufficient to support the
25 ALJ's assessment of Plaintiff's allegations.

26
27 **4. Conclusion.**

28 In sum, the assessment of Plaintiff's subjective symptoms allegations was not

1 supported by clear and convincing reasons based on substantial evidence in the
2 record. Thus, reversal is warranted.

3
4 **B. Remand for further administrative proceedings.**

5 Ninth Circuit case law “precludes a district court from remanding a case for
6 an award of benefits unless certain prerequisites are met.” *Dominguez v. Colvin*,
7 808 F.3d 403, 407 (9th Cir. 2015) (citations omitted). “The district court must first
8 determine that the ALJ made a legal error, such as failing to provide legally
9 sufficient reasons for rejecting evidence.” *Id.* “If the court finds such an error, it
10 must next review the record as a whole and determine whether it is fully developed,
11 is free from conflicts and ambiguities, and all essential factual issues have been
12 resolved.” *Id.* (citation and internal quotation marks omitted).

13 Although the Court has found an absence of clear and convincing reasons
14 based on substantial evidence to discredit Plaintiff’s subjective symptom
15 allegations, the record on the whole is not fully developed, and essential factual
16 issues remain outstanding. The discredited evidence raises factual conflicts about
17 Plaintiff’s level of functioning that “should be resolved through further proceedings
18 on an open record before a proper disability determination can be made by the ALJ
19 in the first instance.” *See Brown-Hunter*, 806 F.3d at 496; *see also Treichler*, 775
20 F.3d at 1101 (stating that remand for an award of benefits is inappropriate where
21 “there is conflicting evidence, and not all essential factual issues have been
22 resolved”) (citation omitted); *Strauss v. Commissioner of the Social Sec. Admin.*,
23 635 F.3d 1135, 1138 (9th Cir. 2011) (same where the existing record does not
24 clearly demonstrate that the claimant is disabled within the meaning of the Social
25 Security Act).

26 Therefore, based on its review and consideration of the entire record, the
27 Court has concluded on balance that a remand for further administrative
28 proceedings pursuant to sentence four of 42 U.S.C. § 405(g) is warranted here. It is

1 not the Court's intent to limit the scope of the remand.

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ORDER

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It is ordered that Judgment be entered reversing the decision of the Commissioner of Social Security and remanding this matter for further administrative proceedings.

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DATED: August 19, 2019

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MARIA A. AUDERO
UNITED STATES MAGISTRATE JUDGE

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